STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RUSSELL JERMAINE CASNAVE,

Defendant-Appellant.

UNPUBLISHED
March 17, 2000

No. 210119
Berrien Circuit Court
LC No. 97 400320-FC

Before: Hood, P.J., and Holbrook, Jr., and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of second-degree murder, MCL 750.317; MSA 28.549. Defendant was sentenced to a term of thirty to fifty years' imprisonment. We affirm.

Defendant first contends that the trial court erred when it denied his motion to suppress evidence of statements he made to police before he received *Miranda*[1] warnings. Specifically, defendant argues that the trial court erred when it ruled that because defendant was not in custody when he made the inculpatory statements, the need to administer *Miranda* warnings had not been triggered. We disagree. Whether a defendant is in custody for purposes of *Miranda* warnings is a mixed question of fact and law which must be answered independently by this Court after a de novo review of the record. *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999); *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997). "To determine whether the defendant was in custody at the time of the interrogation, the totality of the circumstances must be examined. The key question is whether the defendant could have reasonably believed that he was not free to leave." *People v Williams*, 171 Mich App 234, 237; 429 NW2d 649 (1988) (citations omitted).

When the police questioned defendant at the police station, they were in the midst of investigating a missing person report regarding the victim. When defendant was first approached, the police did not know that the victim was dead, and had no evidence which would support charging anyone with a crime in connection with her disappearance. The police decided to speak with defendant because he was the last known person to have seen the victim. Benton Township Police Chief Tom Street testified that defendant agreed to come down to the police station to discuss the victim's

disappearance. Chief Street testified that he personally told defendant as they were leaving to go to the station house that defendant was not under arrest. Defendant was not informed of his *Miranda* rights at that time.

Once at the police station, defendant was taken to an interview room. In the room were Chief Street, Benton Township Police Detective Robert O'Brien, and Benton Harbor police officer Tim O'Brien. Both Chief Street and Detective O'Brien informed defendant that he was free to leave if he wanted to. Defendant initially told police that he did not know where the victim was. Detective O'Brien then told defendant that police had located the victim's car, which appeared to have blood stains on the trunk, and police feared that something had happened to her. Defendant then asked to speak with Detective O'Brien alone. While alone with Detective O'Brien, defendant stated that Carter had died in a horrible accident. Defendant said he believed the victim had been struck with a hammer. According to Detective O'Brien, defendant also said that "he did not know how he came into possession of this hammer, and that he sort of blacked out." Detective O'Brien stopped defendant from saying anything further. Detective O'Brien suggested, and defendant agreed, that they should go retrieve the victim's body. The police did not inform defendant of his *Miranda* rights at that time.

Defendant then directed police to the location of the body. Defendant remained in the back seat of the patrol car, but was not questioned and made no inculpatory statements, beyond telling police where to find the body. After the body was found, defendant was taken back to the police station for further questioning. Upon his return to the station house, defendant was read his *Miranda* rights for the first time, and he agreed to make a statement without an attorney present.

Defendant does not contend that being taken to the police station and questioned by three police officers created a custodial interrogation requiring *Miranda* warnings. Rather, defendant argues that the situation became custodial as the interview progressed. First, defendant asserts that the questioning became custodial when police told defendant that blood stains had been found on the victim's car, because no reasonable person being questioned by police would believe he was no longer free to leave at that point. We disagree. Under the circumstances, there is nothing about the information passed on by the police that somehow transformed the situation into a custodial setting. Further, the fact that police officers thought defendant knew more than he was disclosing did not necessarily mean that defendant was in custody at the time. *Oregon v Mathiason*, 429 US 492; 97 S Ct 711; 50 L Ed 2d 714 (1977); *People v Marsack*, 231 Mich App 364, 374; 586 NW2d 234 (1998). Nor is it of import that defendant might have believed that the investigation was focused on him. *Beckwith v United States*, 425 US 341, 347; 96 S Ct 1612; 48 L Ed 2d 1 (1976).

Alternatively, defendant contends that a custodial interrogation came into existence after he told police that the victim was dead. We disagree. Because defendant was not in custody when he voluntarily stated that the victim was dead, this statement was admissible at trial. As for his statements about possessing the hammer, blacking out, and knowing where the body was located, we believe the record supports the conclusion that those admissions were contemporaneous to the statement about the victim being dead. See *United States v Montano*, 613 F2d 147, 149 (CA 6, 1980). Therefore, there is also no ground to support suppression of these voluntary statements.

The question now turns to those statements made after defendant had volunteered this information. Regardless of whether defendant was in custody after he acknowledged the victim had died,[2] the record indicates that defendant did not elaborate on his earlier admissions until after he had been advised of his *Miranda* rights. It was only at this point that defendant spoke of the circumstances surrounding the death. Assuming without conceding that defendant should have been Mirandized after admitting the victim was dead, this does not mean that his subsequent voluntary waiver of his *Miranda* rights was invalid. *Oregon v Elstad*, 470 US 298, 309; 105 S Ct 1285; 84 L Ed 2d 222 (1985). Absent any evidence of police coercion, we conclude that there is no basis for excluding defendant's post-*Miranda* statements. *Id.* at 318.

Defendant next contends that the trial court erroneously instructed the jurors that they could stop deliberations once they agreed that the elements of second-degree murder were satisfied, without even considering whether a verdict of voluntary manslaughter was warranted. We disagree. Because defendant failed to object to the jury instructions, appellate review is precluded absent manifest injustice. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995); *People v Ferguson*, 208 Mich App 508, 510; 528 NW2d 825 (1995).

After reviewing the instructions given, we conclude that they apprised the jury to the issues to be tried and protected defendant's right to a fair trial. *People v Bell*, 209 Mich App 273; 276; 530 NW2d 167 (1995). Contrary to defendant's assertion, the instructions do not create the impression that defendant could be convicted of second-degree murder even if the jury believed that the crime was done under circumstances that would reduce it to voluntary manslaughter. In fact, the jury was specifically instructed that one of the elements of second-degree murder that the prosecutor has to establish is "that the killing was not done under circumstances that reduce it to a lesser crime." See CJI2d 16.5(4). We are also not persuaded by defendant's argument that the rule of *People v Handley*, 415 Mich 356, 361; 329 NW2d 710 (1982) is inapplicable, given the relationship that exists between the crimes of second-degree murder and voluntary manslaughter.

Affirmed.

/s/ Harold Hood
/s/ Donald E. Holbrook, Jr.
/s/ E. Thomas Fitzgerald

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] At this point in the interview, defendant had indicated that the victim had died violently and that defendant had been in possession of what could reasonably be characterized as the murder weapon. Additionally, defendant also volunteered that he knew where the victim's body was located. This could be interpreted as an indication that he had disposed of the body, which in turn could reasonably be interpreted as implicating defendant in the death. Indeed, Detective O'Brien testified that after

defendant had made these incriminating statements, the officer stopped defendant from saying anything further about what had happened.

However, defendant had been at the station house for a brief period, and there is no evidence that his freedom of movement was restrained either directly or indirectly. Further, both Chief Street and Detective O'Brien testified that defendant was never told that he was under arrest or that he was not free to leave, nor did defendant ever ask if he could leave. There is also nothing about the questioning that could be characterized as being accusatorial, nor any type of official behavior that could called coercive.